

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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Nos. 99-1754(L), 2212(XAP)

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GRINNELL FIRE PROTECTION SYSTEMS COMPANY  
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD  
Respondent/Cross-Petitioner

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 699, UNITED  
ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE  
PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES  
AND CANADA, AFL-CIO, AND UNITED ASSOCIATION OF JOURNEYMEN  
AND APPRENTICES OF THE PLUMBING AND PIPEFITTING  
INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO  
Intervenors

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No. 99-1900

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ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED  
ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE  
PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES  
AND CANADA, AFL-CIO, AND UNITED ASSOCIATION OF JOURNEYMEN  
AND APPRENTICES OF THE PLUMBING AND PIPEFITTING  
INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO  
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD  
Respondent

and

GRINNELL FIRE PROTECTION SYSTEMS COMPANY  
Intervenor

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ON PETITIONS FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Nos. 99-1754 and 99-2122 are before the Court on the petition of Grinnell Fire Protection Systems Company ("the Company") to review an order of the National Labor Relations Board ("the Board") and the cross-application of the Board for enforcement of its order. No. 99-1900 is before the Court on the petition of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO ("the UA"), and Local 669, UA ("Local 669"), collectively called "the Unions," to review the same Board order.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), as the Company transacts business within this circuit. The Board's decision and order were issued on May 28, 1999, and are reported at 328 NLRB No. 76 (A 515-539.)<sup>1</sup> An unpublished order, granting the General Counsel's motion to amend the May 28, 1999, order, was issued on August 10, 1999. (A 507-514.) The Company filed its petition for review on June 4, 1999. The Unions filed their petition for review in the United States Court of Appeals for the

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<sup>1</sup> "A" references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

First Circuit on June 1, 1999. On June 18, 1999, the Judicial Panel on Multidistrict Litigation ordered that the petitions for review be consolidated in this Court. On June 28, 1999, the First Circuit transferred the Unions' petition for review to this Court. The Board filed its cross-application for enforcement on September 1, 1999. Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) place no time limits on the filing of petitions for review or cross-applications for enforcement of Board orders.

#### STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the portions of its order based on uncontested findings of violations.

2. Whether substantial evidence on the record as a whole supports the Board's findings that the parties had not reached a bargaining impasse when the Company implemented its final contract offer and that, therefore, the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the offer and refusing to bargain with the Union thereafter; that the resulting strike was an unfair labor practice strike; and that the Company violated Section 8(a)(1) of the Act by threatening to hire permanent replacements for unfair labor practice strikers.

3. Whether the Board reasonably declined to find that the Company had engaged in overall bad-faith bargaining.

4. Whether the Board reasonably declined to find that the Company violated Section 8(a)(3) and (1) of the Act by constructively discharging its striking employees.

#### STATEMENT OF THE CASE

On charges filed by the Unions, the Board's General Counsel issued a complaint alleging that the Company had violated Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1), (3), and (5)). After a hearing, Administrative Law Judge Richard A. Scully recommended dismissal of an allegation that the Company had unlawfully discharged striking employees. However, he found that, although the Company had bargained in good faith before implementing its final contract offer, the bargaining had not reached impasse at the time of the implementation. Accordingly, he found that the Company had violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the final offer, that the subsequent strike was an unfair labor practice strike, and that the Company violated Section 8(a)(1) of the Act by implying to the unfair labor practice strikers that they could be permanently replaced. (A 526-529, 535-536.) He recommended that the Company be ordered to cease and desist from its unlawful conduct and take affirmative action to remedy that conduct. (A 538-539.)

All parties filed exceptions to the administrative law judge's decision. A majority of the Board (Chairman Truesdale and Member Fox; Member Hurtgen dissenting on this issue) adopted

the finding that impasse had not been reached when the Company implemented its final contract offer and the findings of violations stemming from that finding.

#### STATEMENT OF FACTS

##### I. THE BOARD'S FINDINGS OF FACT

Various locals of the UA have represented sprinkler fitters employed by the Company for many years. (A 522; 163.) Local 669 represents approximately 1200 employees of the Company in 47 states. (A 522; 54, 145, 1153.) For many years, the Company was represented in negotiations with the Unions by the National Fire Sprinkler Association ("the NFSA"), a multi-employer association with more than 150 members. (A 522; 11, 366-367.) The Company was by far the largest member of the NFSA. (A 522; 35, 392.) The last contract negotiated for the Company by the NFSA was effective from April 1, 1991, through March 31, 1994. (A 522; 741.)

By letter dated September 22, 1993, the Company notified Local 669 that it had revoked the NFSA's authority to bargain on its behalf and would henceforth bargain independently with the Unions. It requested an immediate beginning of negotiations for a new contract. (A 522; 1215.) However, the Company remained a member of the NFSA. (A 522; 35.)

In 1992, the Union instituted a policy of "targeting" whereby members of the NFSA faced with competition from non-union

contractors could receive adjustments in wage rates and benefits on a project-by-project basis in certain geographic areas. The Unions made the final decision on what concessions, if any, would be granted. The Company was the principal user of targeting. (A 522; 66-67, 171-172.)

In May 1993, the Unions announced that, to participate in targeting after June 1, an employer had to agree to bargain for the next contract through the NFSA or to be bound by the Unions' next contract with the NFSA. When the Company refused to do so, the Unions excluded it from the targeting program. (A 522; 1620-1621.) The Unions reinstated the Company's eligibility for targeting in July 1993, but again revoked its eligibility when the Company withdrew bargaining authority from the NFSA. (A 522; 70, 1216.)

The Company's president met with union representatives in November 1993 to discuss the forthcoming contract negotiations. He outlined the Company's needs, but made no formal proposal. (A 522; 279, 1159.)

On January 28, 1994, the Company sent the Unions its first contract proposal, asserting that it was losing market share to nonunion competitors because of its high labor costs. The proposal called for paying foremen at the existing contractual rates, but allowing the Company to determine wage rates for helpers (a new job classification) and, within a specified range,

for fitters; allowing a 1:1 ratio of journeymen to apprentices, instead of the existing minimum ratio of 2:1; and replacing the existing National Automatic Sprinkler Industry ("NASI") health and welfare and pension plans with plans from Tyco, the Company's parent corporation. (A 523; 1221-1235.)

The first formal bargaining session occurred on March 17, 1994. Attorney Peter Chatilovicz, the chief spokesman for the Company, presented a revised proposal and described its key elements, saying the Company wanted control over targeting, a reduction in health and welfare and pension costs, and a lower ratio of journeymen to apprentices. (A 523; 442-443.) The revised proposal would have allowed the Company, in its sole discretion, to use targeting on any project with nonunion competition and to reduce journeymen's wage rates to not less than 65 percent of the rates in the old contract. The proposed health and welfare plan would have required employee contributions, which were not required under the existing NASI plan. (A 523; 1242-1257.) The Unions presented a proposal dealing with inspection, subcontracting, the impact of possible changes in laws affecting health care benefits, and the continuation of existing contractual benefits if negotiations extended beyond the contract expiration date. However, they said they needed more time to study the health and welfare and pension proposals. (A 523; 313-315, 827, 1546-1548.)

The parties met again on March 18. The Company requested a renewable 5-day extension of the existing contract. (A 523; 319, 449-450.) The Company increased its minimum targeting wage rate to 75 percent of the existing contractual rate and proposed creation of a joint committee to review any allegations of misuse of targeting on a particular project. It also said that the amount of life insurance provided would be based on the full journeyman rate, not a targeted rate. (A 523; 320, 322.) The Unions said they did not have a response to the Company's proposal and had not yet formulated a counterproposal on wages. However, at the end of the bargaining session, they presented a proposal calling for wage increases for journeymen in each of the three years of the contract. The parties also discussed targeting and the proposed 401(k) plan. (A 523; 78-79, 323-326, 451, 453, 1549.)

On March 22, Local 669 issued a strike notice to its members, directed at both the Company and the NFSA, and rejected the Company's request for a 5-day contract extension. (A 523-524; 326, 1258.) By letter dated March 24, the Company informed its employees that it would hire permanent replacements in the event of a strike. (A 524; 707-708.)

Local 669 had been suffering from internal controversy. On January 28, its president and financial secretary, citing misconduct by the business manager, asked the UA to impose a

trusteeship. (A 522; 820.) On March 25, the UA informed Local 669 that it was imposing a trusteeship, with Tommy Preuett as trustee, effective March 28. (A 522-523; 821-822.) The Company was aware of Local 669's internal problems and was aware that they were interfering with its contract negotiations with the Company and the NFSA. (A 523; 282, 283, 1162.)

On March 30, Preuett held separate meetings with the Company and the NFSA at the same hotel in New York City. (A 524; 80, 149-150, 173.) In both negotiations, Preuett said that he had authority to reach a binding agreement without ratification by the members of Local 669, but that he had little time to familiarize himself with the bargaining issues, and requested a 30-day contract extension. (A 524, 526; 80, 148, 150, 370, 377, 389.) The Company rejected the proposed contract extension, saying it did not want negotiations to drag out for two or three weeks. (A 524; 602.)

In the March 30 meeting between the Company and the Unions, Company negotiator Chatilovicz discussed the Company's feeling that it was having difficulty in getting the Unions to give it a counterproposal; the reasons for its withdrawal from the NFSA; and the adverse effects of the Unions' withholding targeting from it. (A 524; 174, 328, 455.) He said that the Company considered the important issues to be targeting, the ratio of journeymen to apprentices, and its proposed changes in health and welfare and

pension benefits. He expressed concern that the Unions would reach an agreement with the NFSA that did not address these concerns and expect the Company to accept it. (A 524; 186, 454.)

Preuett said that he wanted an agreement, that there would be no strike on April 1, and that he wanted to see whether he could give the Company some things, because of its size, that he would not give other employers. He said that he had no problem with a 1:1 ratio of journeymen to apprentices, but that he was against a uniform targeting rate, because it would defeat the purpose of targeting and allow nonunion contractors to slide under it, and that he was reluctant to give up the NASI health and welfare and pension plans, because he wanted a standardized package including portability and reciprocity, and because the Tyco plan did not provide health coverage for retirees. (A 524; 152, 179, 183-184, 187, 331.) Chatilovicz said that the Company was not "wedded" to the Tyco plan, but wanted an agreement that would cut its costs in health and welfare and pensions. (A 524; 338.)

Preuett said he was meeting with the NFSA the following week and offered to meet with the Company on April 11. Chatilovicz replied that April 11 was too late and that they had to meet for at least two days the following week. They agreed to meet on April 7. (A 524; 602-604.)

In the negotiations between the Unions and the NFSA on March 30, the NFSA expressed concern that the Company would get a better deal and proposed a "most favored nations" clause to prevent this. Preuett, referring to the importance of uniformity in the industry, said that the Company would not get a more favorable contract than the NFSA and that he intended to reach an agreement with the NFSA first. (A 526; 374-375, 377, 382.) On April 6, the Unions and the NFSA reached agreement on a 1:1 ratio of journeymen to apprentices. (A 526; 1588.)

On April 7, the Unions again met separately with the Company and the NFSA at the same hotel. In the morning, the Unions presented a complete contract proposal to the Company, including wage increases; contributions of \$3.75 per hour (the rate in the prior contract) to the NASI health and welfare funds and \$2.20 per hour in the first year, \$2.30 in the second, and \$2.40 in the third to the NASI pension plan; a \$.75 per hour contribution to supplemental pension funds ("SIS") in states where they existed; continued contributions to education and industry promotion funds; and a targeting proposal whereby representatives of the Unions and the Company in each district would set a targeting rate for the following year, based on local marketplace conditions, with a mechanism to protect the Company from arbitrary action by union representatives. (A 524; 192-193, 333, 335.) The Company insisted on a fixed targeting rate of 75

percent, reductions in its health and welfare and pension contributions, and elimination of its SIS, industry promotion, and training funds contributions. (A 524; 191, 775-776.)

In negotiations with the NFSA on April 7, the Unions initially proposed health and welfare contributions of \$3.75 per hour in the first year of the contract, \$3.50 during the second year, and \$3.25 during the third. The parties ultimately agreed on contributions of \$3.75 per hour during the first year and \$3.40 for the last two years. They also agreed on pension contributions of \$2.20 per hour, and SIS contributions of \$.50 per hour in states where they existed, throughout the term of the contract. (A 526; 205, 209.)

In the afternoon, the Unions proposed to the Company that wage rates be frozen at existing levels for the duration of the contract; that a joint committee meet within 60 days to set targeting rates for the next year and, after reviewing the results, set rates for the following year; that health and welfare contributions be \$3.75 per hour for the first year of the contract, \$3.50 for the second year, and \$3.25 for the third; that the SIS contribution in states where applicable be \$.50 per hour the first year, \$.60 the second, and \$.70 the third; and that there be separate wage rates for industrial, commercial, and residential jobs. (A 524; 459, 777.) The Company proposed a fixed targeting rate of 75 percent, to be reviewed and possibly

adjusted after a year, and either the Tyco health and welfare and 401(k) pension plans or contributions of \$2.25 per hour to a NASI health and welfare plan and \$1.20 per hour to a NASI pension plan, but no SIS contributions. (A 524; 337, 341, 461-462.)

In the evening, the Unions offered amended proposals on the hiring of apprentices, overtime, and training fund contributions, and proposed contributions of \$2.20 per hour to the NASI pension fund and \$.50 per hour to the SIS fund throughout the term of the agreement and \$3.75 per hour to the health and welfare fund for the first year of the contract and \$3.40 for the last two years. (A 524; 456-458, 778-779.) The Company accepted the Unions' proposals on overtime and the training fund contribution and some of the language on apprentices, but said it had to control targeting and prepared a chart listing, as open issues, wages and targeting; health and welfare, pension, and SIS contributions; and inspections. (A 524; 613.)

On April 8, the Unions and the Company reviewed the open issues and discussed targeting. The Unions discussed separate rate structures for industrial, commercial, and residential jobs, while the Company reiterated the importance of a fixed targeting rate and said its current proposal on the issue was "final." Preuett said that uniformity of benefits was his primary goal, but that he had to do research on the health and welfare plan to find out what level of benefits a \$2.25 per hour contribution

would provide, on whether moving to the Tyco plan was feasible, and on the 401(k) plan. He added that there was a lot of chaos in Local 669 and that the members' mood was not good, but he was there to get an agreement. The parties agreed to meet again on April 12; the Company requested specific responses from the Unions on targeting and health and welfare, pension, and SIS contributions. (A 524-525; 342-344, 407, 411, 427, 614-617.)

Also on April 8, the Unions and the NFSA reached agreement on wages. The wage rate in the old contract would remain in effect for industrial jobs; employees on residential jobs would be paid 75 percent of that rate; the rate for commercial jobs would be \$1.00 per hour less than the industrial rate in 30 states and \$1.50 per hour less in 17 states. The targeting program in the former contract, with targeting on a job-by-job basis and no fixed rate of reduction, would remain in effect. The last unresolved issue was the NFSA's proposal for a "most favored nations" clause. Preuett said it was unnecessary, because the parties had always worked together in good faith, and that he did not think it was a mandatory subject of bargaining. The NFSA finally dropped its proposal, and the parties had an agreement. (A 526; 219-220, 385.)

When the Company and the Unions met on April 12, the Company was aware of the details of the agreement between the Unions and the NFSA. (A 525; 345.) Chatilovicz said he wanted to settle

the remaining economic issues and get an agreement. Preuett said he also wanted an agreement. Chatilovicz told him to "stop bullshitting," accused him of "playing games," and suggested a federal mediator. Preuett replied that he was not playing games and that he wanted uniformity in the industry, but had made concessions on several issues. Chatilovicz asked for the Unions' best proposal and said he would not be surprised if they had to have the same agreement they had reached with the NFSA. (A 525; 349, 412, 618-619.)

Paul Green, an attorney with benefits expertise, attended the meeting on behalf of the Unions and asked questions about the Tyco benefit plans. Chatilovicz said he understood that the Unions did not want to give up the NASI health and welfare plan and was not interested in the Tyco plan. He asked whether there was any way Preuett could accept the Tyco plans. Preuett said he was not sure. When Green continued to ask questions, Chatilovicz again insisted that Preuett had said he was not interested in the Tyco plans. Preuett said they were bargaining. Chatilovicz replied that if the Unions wanted to bargain, they should "stop the bullshit;" if Preuett wanted to propose the NFSA agreement, he should do so, but it was insulting to bring in Green to pick at the Tyco plans. (A 525; 155-157, 351-352, 399-400, 408, 428.)

The parties discussed the wage rates in the NFSA agreement. Chatilovicz said he knew the Unions wanted uniformity and that he

would not consider it unfair for the Unions to offer the NFSA proposal and say they could go no further on wages. Preuett replied that he wanted a wage freeze with no fixed targeting rate, and discussed the reduced rates for commercial and residential work in the NFSA agreement. (A 525; 270, 352, 403.)

After lunch, the Company presented its "final proposal," under which the wage rates for foremen would be frozen at the levels in the prior contract; the wages of journeymen would be reduced to 80 percent of the old contractual level on any job with competing nonunion bidders; the Tyco health and welfare and 401(k) plans would be put into effect; there would be no employee contributions to the health and welfare plan for the first year, except for employees choosing "high option" coverage; the 401(k) plan would include a service credit of \$200 per year, up to a maximum of \$1000; and there would be no SIS contributions. Chatilovicz said that if Preuett could not accept this proposal, he should give his best and final proposal. (A 525; 223-225, 354-356.)

The Unions made a counterproposal, reiterating their prior health and welfare and pension proposals and offering wage reductions on commercial jobs of \$1.00 per hour in 30 states and \$1.50 per hour in 17 states. The proposed wages were \$.50 per hour lower than in the NFSA agreement for Arizona and Virginia and \$.50 higher for New York. (A 515, 516, 525; 356-357.)

Preuett said that he felt this would lower the Company's costs tremendously and make it competitive, but that he was willing to meet indefinitely to get an agreement. Chatilovicz said he would assume this was the Unions' last offer. Preuett said it was not his last offer; he wanted an agreement and was flexible. (A 525; 228, 360, 405, 414, 416.)

After a break, Chatilovicz said that both sides had worked hard to get an agreement, but that the Unions' proposal did not give the Company enough savings; the Company was only interested in itself and did not want the terms of the NFSA agreement. He said that the Company's negotiators would be in his office until 6 p.m. in case Preuett changed his mind. Preuett said that the Company had been trying all day to push him to an impasse, but that he did not want one. He asked how far apart the parties were and in what states the Company needed further concessions. After a discussion of differences in wage rates in some states, the meeting ended. (A 525; 158, 260, 364, 410, 625-626, 794-795, 858, 868.)

About 6 p.m., Preuett phoned Chatilovicz and asked for a meeting the next day. Chatilovicz asked what the Unions would propose. Preuett said he would try to get the Company to raise its wage offer. Chatilovicz said that the Unions had the Company's final proposal, and the Company would not change its offer on wages and benefits. (A 525-526; 160, 362, 429, 1553.)

Preuett asked about bringing in a federal mediator. Chatilovicz asked whether the Unions were willing to come down to the rates proposed by the Company. Preuett replied that he was not willing to accept those rates, but did not say that he was unwilling to lower his proposed wages and benefits. (A 515-516, 526 & n.6; 266, 362-363, 429, 1617.) Chatilovicz said he did not think a mediator would help. Preuett asked whether the Company's proposed rates were "carved in stone;" Chatilovicz said they were. Preuett said that he hoped the Company would change its mind and that maybe the parties could get together somewhere down the road. (A 526; 160, 266-267, 362.)

Later that evening, Preuett called a nationwide strike against the Company, which was still in effect in October 1995 (A 526; 161.) On April 13, the Company informed the employees and the Unions that it was implementing its final offer, effective April 14. (A 526; 1204-1208.) Also on April 13, the Company's president, in a letter to all employees, stated that if the employees went on strike, the Company would hire permanent replacements, who would have the right to continue working even after the strike ended. (A 535; 710.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Truesdale and Members Fox and Hurtgen) found, in agreement with the administrative law judge ("ALJ"), that the Company had bargained

in good faith prior to the implementation of its final offer (A 519, 527), and that the Company had not discharged its striking employees by telling them that they would be permanently replaced. (A 535-536.) However, a majority of the Board (Member Hurtgen dissenting on this issue) found, in agreement with the ALJ, that the parties had not reached an impasse in bargaining when the Company implemented its final offer. (A 515-516, 526-529.) Accordingly, the Board majority found, in agreement with the ALJ, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing its final contract offer and by refusing to bargain with the Unions thereafter; that the strike, which was caused and prolonged by this unlawful conduct, was an unfair labor practice strike; and that the Company violated Section 8(a)(1) of the Act by implying that unfair labor practice strikers could be permanently replaced. (A 516, 529, 536.)<sup>2</sup>

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<sup>2</sup> The Board also affirmed the ALJ's findings of additional violations that are not contested here (see pp. 25-26 below): The Company violated Section 8(a)(1) of the Act by calling an employee a troublemaker and telling him he would be laid off for pursuing a grievance; telling employees that they would lose their jobs if they refused to cross a picket line; telling employees that they had to resign from the Unions to continue working for it; and offering an employee additional benefits if he resigned from the Unions. (A 531, 532-533.) In addition, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by laying off an employee for insisting on receiving subsistence pay to which he was contractually entitled and paying employees who worked during the strike better wages than it had offered the Unions, and violated Section 8(a)(5) of the Act by

The Board ordered the Company to cease and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights; to bargain, on request, with the Unions and embody any understanding reached in a signed agreement; to restore, on request by the Unions, the terms and conditions of employment that were applicable prior to its unilateral implementation of its final contract offer and to continue them in effect until the parties reach an agreement or a good-faith impasse in bargaining; to make bargaining unit employees whole for any losses suffered as a result of its unlawful unilateral action; and to post copies of an appropriate notice. (A 517-518.) The Board subsequently amended its order to require the Company to offer all striking employees, on their unconditional application, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any replacements hired after the start of the strike, and to make the striking employees whole for any loss of earnings or other benefits resulting from any failure to reinstate them within 5 days of their unconditional offer to return to work. (A 509-510.)

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offering the employees better wages than it had offered the Unions. (A 534-535, 536-537.)

## SUMMARY OF ARGUMENT

1. Substantial evidence on the record as a whole supports the Board's finding that the parties had not reached impasse when the Company unilaterally implemented its final contract offer and refused to continue bargaining with the Unions. An impasse exists only when neither party is willing to compromise. A subjective belief by one party that the concessions offered by the other are inadequate does not establish impasse; there must be no objectively reasonable hope of reaching agreement.

The Company, which had the burden of proving that impasse had been reached, failed to meet that burden. It did not show that the Unions were unwilling to make any further concessions. During the course of the negotiations, the Unions had modified their proposals on wages and benefits several times, moving from a demand for increases to a willingness to accept reductions. They never asked the Company to accept the NFSA contract or indicated that they would not agree to greater concessions than they had given the NFSA. To the contrary, their last offer contained wage rates differing from those in the NFSA contract in some states, and they indicated a willingness to make additional reductions in more states if the Company showed that it needed them. In addition, the Unions, in their negotiations with the NFSA, rejected a "most favored nation" clause which would have precluded them from giving the Company more concessions than they

gave the NFSA; their resistance to this clause would have served no purpose if they were determined never to give the Company more concessions.

The Board properly viewed the 1994 negotiations between the Company and the Unions as analogous to bargaining for an initial contract, in which more time is normally required to reach agreement or impasse. These negotiations differed significantly from the parties' prior negotiations; the Company was bargaining separately, rather than as part of a multiemployer association, and was seeking far greater concessions on wages and benefits than the remaining members of the association were. In addition, the parties had new negotiators who did not know one another or understand that the other party's negotiators had a different approach to the bargaining process. In light of all these factors, the Board reasonably concluded that the four bargaining sessions following Preuett's appointment as the Unions' chief negotiator were not enough to exhaust the possibility of agreement.

The record does not show that the Unions were trying to prolong negotiations to avoid impasse. On the day of the fourth bargaining session in less than two weeks, the Unions sought another meeting the next day with a federal mediator present, but the Company refused to continue negotiations. The Company has not shown that it faced a financial or other crisis that might

justify its imposition of a time limit on negotiations. Even if the Company believed an impasse had been reached, the Unions did not; their negotiator repeatedly said he wanted an agreement, not an impasse. The parties' disagreement over control of targeting was not a fundamental difference of principle, but a matter of dollars and cents; the Company sought control of targeting to ensure that its labor costs would be reduced.

The Board properly rejected the Company's contention that an employer seeking reductions in wages and benefits should be free at any time to make a "final" offer, and to declare impasse unilaterally and implement the offer if the union does not accept it in toto, as long as the employer has previously bargained in good faith. Such a rule would be contrary to the statutory policy that changes in wages and benefits should, whenever possible, result from mutual agreement, rather than from unilateral action by either party; the "impasse" rule is an exception to that policy which the Board is justified in interpreting narrowly. The proposed change in the rule would favor an intransigent party over one whose bargaining position remains flexible.

In this case, the Company, seeking to reduce wages and benefits to increase its profits, tried to push the Unions into impasse, set an arbitrary deadline for reaching either agreement or impasse, and then refused to consider the Unions' offer of

further concessions. Under these circumstances, the Board was not required to hold that the Company was entitled to declare impasse merely because the Unions did not totally capitulate to its demands. Nor did the Unions' calling a strike in direct response to the Company's refusal to continue bargaining require a finding of impasse.

2. The Board reasonably declined to find that the Company had bargained in bad faith prior to its premature declaration of impasse. The Company plausibly explained its need for wage and benefit concessions, significantly modified its position on these issues during negotiations, attempted to arrange an early start of negotiations, and reached agreement on 26 of 31 proposed contract articles after three bargaining sessions. The Company's conduct away from the bargaining table, including a survey whose results were shared with the Unions, an internal memo detailing a benefit package for striker replacements only, and an unlawful payment to fewer than 1 percent of its employees of higher wage rates than it had offered the Unions, does not compel a finding of overall bad faith bargaining.

3. The Board reasonably declined to find that the Company had either discharged or constructively discharged its striking employees. The Company did not cause any employees to quit by imposing difficult, unpleasant, or unlawful working conditions. Its letter telling them that it would permanently replace any

strikers unlawfully threatened to terminate their employment in the future, but did not immediately effectuate such a termination. The letter expressly gave the employees the option of working during the strike; its reference to replacement of strikers added nothing to similar references in prior letters. It did not assert that replacements had already been hired or set a deadline after which they would be hired, and thus did not require employees to choose immediately between their jobs and their right to strike.

#### ARGUMENT

##### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER BASED ON UNCONTESTED FINDINGS OF VIOLATIONS

In its brief, the Company does not contest the findings of violations set forth at p. 19 n.2 above. Indeed, it did not file exceptions to the ALJ's findings that those violations had occurred. The failure to file exceptions precludes it from challenging those findings in this Court. See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-666 (1982); NLRB v. Cast-a-Stone Products Co., 479 F.2d 396, 398-399 (4th Cir. 1973). Moreover, the failure to challenge the findings in its brief to this Court waives any objections that could be raised here. Corson and Gruman Co. v. NLRB, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990). Accordingly, the portions of the Board's order-- paragraphs 1(a)-(c), (e), (f), (i), (j), 2(c), (d), and the

corresponding paragraphs of the required notice--based on the uncontested findings are entitled to summary enforcement. NLRB v. Frigid Storage, Inc., 934 F.2d 506, 509 (4th Cir. 1991).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE PARTIES HAD NOT REACHED A BARGAINING IMPASSE WHEN THE COMPANY IMPLEMENTED ITS FINAL CONTRACT OFFER AND THAT, THEREFORE, THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING THE OFFER AND REFUSING TO BARGAIN WITH THE UNIONS THEREAFTER; THE RESULTING STRIKE WAS AN UNFAIR LABOR PRACTICE STRIKE; AND THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING TO HIRE PERMANENT REPLACEMENTS FOR UNFAIR LABOR PRACTICE STRIKERS

All of the contested findings of violations turn on a single issue: whether the parties had reached a bargaining impasse when the Company unilaterally implemented its final contract offer. Thus, the Company does not, and cannot, argue that its unilateral action would have been lawful even in the absence of impasse. See NLRB v. Katz, 369 U.S. 736, 743, 747 (1962); Universal Security Instruments, Inc. v. NLRB, 649 F.2d 247, 258-259 (4th Cir. 1981). Nor does it challenge the Board's finding (A 516, 529) that the strike was caused at least in part by this unilateral action and the Company's refusal to continue bargaining. That finding is enough to establish that the strike was an unfair labor practice strike if the foregoing actions of the Company were unlawful. "A strike that is caused in whole or in part by an employer's unfair labor practices is an unfair labor practice strike." Northern Wire Corp. v. NLRB, 887 F.2d

1313, 1319 (7th Cir. 1989). Accord Northern Virginia Steel Corp. v. NLRB, 300 F.2d 168, 174 (4th Cir. 1962). Similarly, if the strike was an unfair labor practice strike, the Company's telling the strikers that it would hire permanent replacements who would be retained even if the strike ended was an unlawful threat to deny the strikers their reinstatement rights. See Cagle's, Inc. v. NLRB, 588 F.2d 943, 949 (5th Cir. 1979); Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403, 411 (9th Cir. 1977).

#### A. General Principles and Standard of Review

An employer normally violates Section 8(a)(5) and (1) of the Act by unilaterally changing any term or condition of employment that is a mandatory subject of bargaining. NLRB v. Katz, 369 U.S. 736, 743, 747 (1962); Universal Security Instruments, Inc. v. NLRB, 649 F.2d 247, 258-259 (4th Cir. 1981). A long-recognized exception to this rule exists when the parties, after bargaining in good faith, have reached an impasse. In that situation, "an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." Taft Broadcasting Co., 163 NLRB 475, 478 (1967), affirmed sub nom. AFTRA v. NLRB, 395 F.2d 622, 624 (D.C. Cir. 1968).

An impasse "is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to reach agreement . . ., neither party is willing

to move from its . . . position." Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973), enforcement denied on other grounds, 500 F.2d 181 (5th Cir. 1974). This Court has defined an impasse as "that point in negotiations when the parties, in good faith, are entitled to conclude that further bargaining would be futile." AMF Bowling Co. v. NLRB, 63 F.3d 1293, 1301 (4th Cir. 1995). There must be "no objectively reasonable hope of reaching an agreement;" impasse "is not demonstrated simply when one party's concessions are not thought to be adequate or when frustration in the movement in negotiations has reached a subjectively intolerable level." Id.

"[F]or a[n] [impasse] to occur, neither party must be willing to compromise." Huck Mfg. Co. v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982). An impasse does not automatically occur "whenever one party announces that his position is henceforth fixed and no further concessions can be expected." Westchester County Executive Committee, 142 NLRB 126, 127 (1963). "It takes two to be at impasse." PRC Recording Co., 280 NLRB 615, 639 n.19 (1986), enforced sub nom. Richmond Recording Corp. v. NLRB, 836 F.2d 289, 293 (7th Cir. 1987). "Futility . . ., not some lesser level of frustration, discouragement, or apparent gamesmanship," is required to establish impasse. Powell Electrical Mfg. Co., 287 NLRB 969, 973 (1987), enforced in pertinent part, 906 F.2d 1007, 1010-1012 (5th Cir. 1990).

Relevant factors in determining whether a bargaining impasse exists include the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. Taft Broadcasting Co., 163 NLRB 475, 478 (1967), affirmed sub nom. AFTRA v. NLRB, 395 F.2d 622, 627-629 (D.C. Cir. 1968). Evidence of a need for expeditious action is also relevant in determining whether impasse has been reached. See Dubuque Packing Co., 303 NLRB 386, 392 (1991), enforced in pertinent part sub nom. Food and Commercial Workers Local 150-A v. NLRB, 1 F.3d 24, 30, 34 (D.C. Cir. 1993). Not all of these factors need suggest the absence of impasse for a finding of no impasse to be proper. See Teamsters Local 639 v. NLRB, 924 F.2d 1078, 1083-1084 (D.C. Cir. 1991) (upholding finding of no impasse based on length of negotiations and contemporaneous understanding of parties). Because impasse is an affirmative defense to a charge of unlawful unilateral changes, the party asserting impasse has the burden of proving it. North Star Steel Co., 305 NLRB 45 (1991).

Whether impasse has been reached "is a question of fact involving the Board's presumed expert experience and knowledge of bargaining problems." Indeed, "few issues are less suited to appellate judicial appraisal . . . or better suited to the expert

experience of a [B]oard which deals constantly with such problems" than evaluation of bargaining processes. Dallas General Drivers v. NLRB, 355 F.2d 842, 844-845 (D.C. Cir. 1966). The Board's finding of no impasse is conclusive if supported by substantial evidence on the record as a whole. NLRB v. WPIX, Inc., 906 F.2d 898, 901 (2d Cir. 1990).

The Act does not define, or even mention, the term "impasse." Accordingly, a reviewing court may not substitute its own definition of the term for a reasonable definition by the Board. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). Moreover, insofar as the Board's definition involves "the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" NLRB v. J. Weingarten, Inc., 420 U.S. 251, 267 (1975) (citation omitted).

B. The Company Failed to Prove That  
Impasse Had Been Reached

The record shows that during the few negotiating sessions that followed the appointment of Preuett as chief negotiator for the Unions, both parties made meaningful changes in their proposals, even on the issues on which they did not ultimately reach agreement. On wages, the Company increased its proposed "targeting" rate from 65 percent of the regular wage rate to 75 percent and then to 80 percent. On health and welfare and

pension contributions, it initially proposed the plans of its parent corporation, Tyco, but later indicated that it was not wedded to the Tyco plans and would accept the Unions' NASI plans if the amounts of its contributions were reduced. It characterized its April 12 proposal as its "final offer" on these issues. However, "the use of 'final offers' as bargaining ploys is common" and does not require a finding of impasse. Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501, 1506 (7th Cir. 1991).

Moreover, as the Board majority pointed out, (A 516), "even assuming . . . that the Company has demonstrated that it was unwilling to compromise any further, . . . it has [not] demonstrat[ed] that the Union[s] [were] unwilling to do so." The record does not support the Company's assertion, (Br 1), that the Unions "avoid[ed] the central bargaining issues and ma[de] only meaningless changes in [their] bargaining position." Rather, the Unions, like the Company, altered their position during the course of negotiations, left the door open for further modifications, and were responsive to the Company's expressed concerns.

The Unions made two different proposals to reduce health and welfare contributions below the existing levels for the last two years of the new contract; reduced the proposed pension contributions for the last two years; and twice reduced the

proposed SIS contributions. At the final meeting, on April 12, the Unions made no new proposals on these subjects, but, for the first time, brought an expert on benefits, who asked questions about the Tyco plan. The Company's own expert conceded that the questions were proper ones (A 471); its chief negotiator's assertion to the contrary was based solely on his belief that the Unions would never agree to the Tyco plan, although Preuett twice refused to rule out doing so. (A 789-790.)

With respect to wages, the Unions proposed that a targeting rate for each locality be set by mutual agreement of the parties (A 192-193), a provision not in the subsequently negotiated NFSA contract (A 220.) They later dropped their proposal for a wage increase and proposed a freeze instead. Finally, on April 12, they proposed wage reductions--greater in some states than in others--for commercial projects, and, on being told these were insufficient, asked in what states the Company needed further reductions (A 260, 410), clearly implying that their proposals, unlike the Company's, were not "carved in stone." (A 160.)

The Company's argument that the Unions' position on these issues was fixed rests on repeated assertions, (Br 9 & n.3, 12 & n.4, 13-15 & n.5, 17, 22, 27, 30-33, 37, 39 & n.12, 46), that the Unions would never have accepted any contract offer whose terms differed significantly from those in the Unions' new contract with NFSA. As shown below, the Board majority properly found, (A

516), that the record does not support this assertion and that, even assuming that the Company believed it to be true, there was no objective basis for such a belief. The Company's subjective belief that the Unions would accept only the NFSA terms would not be enough to show impasse; that belief would have to be objectively reasonable. See AMF Bowling Co. v. NLRB, 63 F.3d 1293, 1299 (4th Cir. 1995).

The Unions concededly never proposed that the Company simply accept the NFSA contract (A 40, 93, 127), despite repeated suggestions from the Company that they do so. (A 790, 792.) Further, Preuett denied repeated assertions by the Company's negotiators that the Unions' offer was final, and accused the Company of trying to push him to impasse (A 364, 794), an accusation which, significantly, the Company's negotiators did not deny. And, contrary to the Company's assertion, (Br 47), Preuett did not say in his final telephone conversation with the Company's negotiators that "the Union . . . would not move further unless [the Company] moved first . . ." The ALJ discredited the testimony of the Company's negotiators that Preuett said he was unwilling to change his proposal, and credited his testimony that he only said he was unwilling to accept the Company's final offer. (A 526 n.6; 236.) "It is well settled that absent exceptional circumstances, the ALJ's credibility findings, 'when adopted by the Board are to be

accepted by the [reviewing] court.'" NLRB v. Air Products and Chemicals, Inc., 717 F.2d 141, 145 (4th Cir. 1983) (citation omitted).

Moreover, the Unions affirmatively indicated their willingness to offer the Company concessions not offered to the NFSA. At the first bargaining session Preuett attended, he expressed a desire to see whether, in view of the Company's size, he could grant it concessions that he would not give other companies. (A 113-114.) At the next session, he proposed negotiating a "targeting" rate for each locality (A 192-193); there is no evidence that the Unions made a similar offer to the NFSA. Finally, on April 12, he proposed wages differing from those in the NFSA contract in two or three states (A 357) and offered to discuss further reductions in states where they were needed (A 260, 410.) In denigrating the differences between the Unions' April 12 proposal and the NFSA contract as "inconsequential" or "incremental," (Br 42), the Company ignores this clear indication that those differences marked the beginning, not the end, of the Unions' willingness to depart from the NFSA terms. At the bargaining table, the Company did not attempt to test the Unions' assertion of flexibility, but "emitted a cry of pain before it sustained any injury."

Minnesota Mining & Mfg. Co. v. NLRB, 415 F.2d 174, 178 (8th Cir. 1969). It "chose to assume that the Union[s] [were] wedded to

the agreement [they] had signed with the [NFSA] and refused to listen to the Union[s'] repeated assurances that such was not the case." (A 516.)

The Company relies, (Br 9, 12 n.4, 27, 30-31), on statements by Preuett to the NFSA that he would not give the Company a better deal than he gave the NFSA. He made no similar statements to the Company's negotiators, even when they invited him to do so. As the Board noted, (A 528), there is no evidence that the Company was aware of his statements to the NFSA when it asserted an impasse and broke off negotiations.<sup>3</sup> Accordingly, it cannot rely on those statements to show that it reasonably believed that the Unions would make no further concessions.

What the Company did know on April 12 was the substance of the Unions' agreement with the NFSA. (A 39-40, 284-285, 400-401.) That agreement did not include a "most favored nation" clause, which would have obligated the Unions to give the NFSA members any concessions they gave the Company. The NFSA had sought such a clause, but the Unions rejected it, even when it was the last remaining item in issue and thus the last obstacle to reaching a contract, and finally persuaded the NFSA to yield.

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<sup>3</sup> There was nothing improper about Preuett's saying one thing to the NFSA and another thing to the Company. If anything, his statements to the Company suggest that his earlier remarks to the NFSA "were merely for public consumption and should not be taken as gospel." D.C. Liquor Wholesalers, 292 NLRB 1234, 1236 (1989), enforced sub nom. Teamsters Local 639 v. NLRB, 924 F.2d 1078, 1083-1084 (D.C. Cir. 1991).

(A 219, 384-385.) The Board properly attached significance to this. (A 516 n.4, 528.) If the Unions were determined never to give the Company better terms than they had given the NFSA, they could simply have accepted the "most favored nation" clause and then told the Company that they were not free to offer it more than the terms of the NFSA agreement. It cannot be assumed that the Unions resisted the proposed clause to the point of delaying final agreement for no reason. The logical inference is that they did so precisely because they wished to remain free to offer the Company more.<sup>4</sup>

In finding no impasse, the Board also relied (A 526-529) on the factors set forth in Taft Broadcasting Co., 163 NLRB 475, 478 (1967), affirmed sub nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968): bargaining history, good faith, length of negotiations, importance of issues, and contemporaneous views of the parties. As shown below, the Board properly concluded that these factors do not show that the Company met its burden of proving impasse.

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<sup>4</sup> The Company contends, (Br 16 & n.6, 31 n.9), that the ALJ improperly refused to consider evidence that in subsequent bargaining sessions, the Unions offered no further concessions. However, it is settled that "the Board may not premise its impasse finding on events occurring after the declaration of impasse." Teamsters Local 639 v. NLRB, 924 F.2d 1078, 1084 n.6 (D.C. Cir. 1991). Moreover, if subsequent events were relevant, the fact that the Unions later made significantly greater concessions to other employers than to the NFSA (A 250, 257) strongly suggests that they were not committed to strict uniformity.

Although the parties' relationship was 80 years old--older than the Act itself--the Board was warranted in finding that the 1994 negotiations were analogous to bargaining for an initial contract. They were significantly different from the parties' prior negotiations, in which the Unions were negotiating, not with the Company alone, but with the NFSA. In addition to negotiating separately for the first time, the Company was demanding major concessions on wages and benefits, a position drastically different from the NFSA position in this and prior negotiations. Further, negotiations were hampered by the Unions' internal strife, culminating in the imposition of a trusteeship and the substitution of the trustee for their previous negotiators. The result of all these changes was, as the Board found, (A 526), that "the parties' negotiators had no experience or familiarity with one another and no feel for one another's approach to the bargaining process." These circumstances militate against a finding of an early bargaining impasse. See Storer Communications, Inc., 294 NLRB 1056, 1083 (1989) (prior bargaining history held not to indicate impasse where new negotiator proclaimed that his approach to bargaining varied from that of his predecessors).

The Board has no hard-and-fast rule as to the number of bargaining sessions required before impasse. Compare Lou Stecher's Super Markets, 275 NLRB 475, 476-477 (1985) (finding

impasse after three bargaining sessions where union representative said that parties were "far apart" with "no way" to "get together" and parties, who had agreed to meet daily, held no further bargaining sessions) with Caravelle Boat Co., 227 NLRB 1355 (1358 (1977) (14 bargaining sessions followed by 4½-month hiatus in bargaining insufficient to establish impasse).

However, the number of sessions is "an important factor to be weighed" in determining whether impasse has been reached. NLRB v. Powell Electrical Mfg. Co., 906 F.2d 1007, 1012 (5th Cir. 1990). Here, only four bargaining sessions took place after Preuett became the Unions' chief negotiator, and the first session was partly devoted to introductions and explanation of Preuett's authority. Thus, only three sessions, all in the space of less than a week, were wholly devoted to substantive negotiations.<sup>5</sup> As shown below, the Board reasonably concluded, (A

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<sup>5</sup> Contrary to the Company's contention, (Br 36 n.10), the Board properly found, (A 527), that only the bargaining sessions involving Preuett should be counted in determining whether an impasse existed. In effect, bargaining "began anew" with Preuett's arrival on the scene. NLRB v. WPIX, Inc., 906 F.2d 898, 901 (2d Cir. 1990). His appointment as trustee ended the intraunion strife which, as the Company knew, was hampering negotiations; he canceled the threat of an April 1 strike which the Unions had previously made; and, contrary to the Company's assertion that he "showed no more interest than his predecessors in reaching agreement on the key issues of wages and benefits" (Br 36), he moved quickly from seeking increases in wages and benefits to being willing to accept reductions in both.

Even if prior bargaining sessions were taken into account, there were only two such sessions, with no substantive proposals

527), that such a short period of bargaining was not enough to exhaust the possibility of agreement.

As noted above, p. 37, the novelty of the separate bargaining between the parties suggests that a longer period of bargaining would be needed to reach an agreement or conclude that one could not be reached. As the Board pointed out, (A 527), the Company implicitly recognized this by seeking negotiations and submitting a contract proposal several months before the old contract expired (A 279, 1159, 1221.) The fact that the Company was demanding "radical departures from the existing contract" (A 527) also militates against any expectation of quick agreement. Cf. Harding Glass Co, 316 NLRB 985, 991 (1995) (finding that proposals for "Draconian cuts" warranted "more extensive discussion" than had occurred), enforced in pertinent part, 80 F.3d 7, 10 (1st Cir. 1996).<sup>6</sup> Early capitulation cannot realistically be expected in such circumstances.

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from the Unions on key issues. Consideration of those two sessions thus would not compel a conclusion that they, together with the four sessions involving Preuett, were enough to bring about impasse.

<sup>6</sup> In arguing, (Br 36 n.10), that if four bargaining sessions were enough for the Unions to reach agreement with the NFSA, they should have been enough to reach agreement with the Company, the Company disregards the fundamental difference between the relatively modest changes in the prior contract sought by the NFSA and its own demands for far more sweeping changes. It is perfectly logical for the Unions to have been willing to agree quickly to the former, but not the latter.

Moreover, the record does not show that the Unions were attempting to prolong the negotiations merely to avoid impasse. Preuett met with the Company twice while he was still busy with the NFSA negotiations, met again less than a week later, and requested still another meeting, with a federal mediator present, the very next day. (A 160, 362.) This request differs only in dramatic degree, not in kind, from the "begging to negotiate" found to negate impasse in PRC Recording Co., 280 NLRB 615, 639 (1986), enforced sub nom. Richmond Recording Corp. v. NLRB, 836 F.2d 289, 293 (7th Cir. 1987). It stands in glaring contrast to Western Newspaper Publishing Co., 269 NLRB 355, 361 (1984), which involved "successive meetings extending over 7 months with not an iota of yielding on [the union's] part as to the critical question . . .", or Times Herald Printing Co., 221 NLRB 225, 229 (1975), affirmed, 223 NLRB 505 n.5 (1976), where impasse was found after "9 months of fruitless negotiations spread over 25 bargaining sessions," or H & H Pretzel Co., 277 NLRB 1327, 1333, 1334 (1985), where the union made a belated demand for an examination of the employer's books after previously ignoring an explicit offer of such an examination and an assertion (not made here) that the employer could not remain in business under the terms of the existing contract.

In contrast, the Company, as early as March 30, expressed an unwillingness to have negotiations "drag . . . out" for even two

or three more weeks. (A 602.) On April 12, less than two weeks later, the Company's negotiators did not deny Preuett's assertion that they were trying to push him to impasse. That evening, they refused to negotiate even for one more day, or even to have a federal mediator assist in negotiations, (A 160, 362), although they had themselves suggested using a mediator earlier that day (A 412, 787, 850.) The Company has never explained to the Unions, the Board, or this Court why an immediate agreement was so urgent. It faced no financial or other crisis; it asserts, (Br 3, 28), only that its market share and profits had declined, not that some catastrophe was imminent. As the Board found, (A 528), the Company "chose to draw an arbitrary [dead]line as to when negotiations should end, rather than to let them run their course, although it has articulated no compelling reasons for doing so."

Even assuming that the Company believed on April 12 that impasse had been reached, it is clear that the Unions did not share that belief. Thus, Preuett insisted on April 12 that he wanted an agreement, not an impasse. (A 410, 625.) He repeated this desire in the final telephone conversation that evening. (A 160.) Cf. Huck Mfg. Co. v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982) (testimony of union's chief negotiator that he never felt parties were at impasse held "especially significant" in finding no impasse).

Undoubtedly, the unresolved issues of wages and fringe benefits were important to both parties. However, contrary to the Company's contention, the dispute over targeting was not "a fundamental difference of principle" on which "it was clear that the parties were not going to compromise" (Co. Br 35), but was, as the Board majority found, (A 516 n.4), a "matter[] of dollars and cents." The Company itself raised the proposed "targeting" wage rate from 65 to 75 percent, and then to 80 percent, of the existing contractual wage rate. Moreover, the Company states that its overriding objective in negotiations was "to lower its wage rates and reduce its benefit costs," (Br 28), and that it sought to "eliminat[e] the Union[s'] discretion to deny targeting as under the prior program," (Br 12), because the exercise of that discretion had left the Company "to compete against non-union contractors without the wage relief that targeting had provided" (Br 5). Thus, the Company sought control over targeting, not to vindicate any abstract philosophical principles, but solely to ensure that the desired reduction in labor costs would occur. The Unions' disagreement with this goal no more created a "fundamental difference of principle" than a straightforward disagreement over wage rates would.

As shown below, pp. 49-53, the Board properly found, (A 527), that the Company bargained in good faith prior to its premature declaration of impasse. However, under settled law,

while good faith in bargaining is a necessary condition to a finding of impasse, it is not a sufficient condition. The Company's contention, (Br 51), that the Board's inquiry should end once it finds good faith ignores both longstanding Board law, approved by the courts, that good faith is only one factor to be considered in determining whether impasse exists, and the Supreme Court's holding that the Board may find an employer's unilateral action to be a violation of Section 8(a)(5) "without also finding the employer guilty of overall subjective bad faith." NLRB v. Katz, 369 U.S. 736, 747 (1962) (emphasis added).<sup>7</sup>

The Company's basic argument is that in "concession" bargaining--that is, where the employer seeks reductions in wages and benefits--an employer, not otherwise guilty of bad faith

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<sup>7</sup> This Court's decision in AMF Bowling Co. v. NLRB, 63 F.3d 1293 (4th Cir. 1995), relied on by the Company, (Br 25-26), is not to the contrary. The Court there recognized that "The policy of the . . . Act is to encourage negotiation and to give the bargaining process a chance to work, even if the chance for success is remote." In finding that the chance for successful bargaining was not only remote, but nonexistent, the Court did not merely rely on the employer's good faith in negotiations, but noted that the union "never discussed a wage concession of any amount" (63 F.3d at 1300) and said that it would not do so unless the employer gave it information to which it was not legally entitled (id. at 1300, 1302). Similarly, in Excavation-Construction, Inc. v. NLRB, 660 F.2d 1015, 1018, 1020 (4th Cir. 1981), the employer was willing to accept a multiemployer contract with the addition of one provision, and asked what concession the union might accept. The union offered no concessions; it insisted on the multiemployer contract with no changes, and its members overwhelmingly rejected the provision sought by the employer. The Unions' conduct here was very different from the intransigent refusals to make any concessions in the above cases.

bargaining, should be free at any time to make a "final" offer and, if the union does not accept the offer in toto, to declare impasse unilaterally and implement the terms of the "final" offer. (Br. 28-29, 44-45, 50-51.) As noted above, pp. 27-28, this is clearly not the law with respect to bargaining in general, where "[i]t takes two to be at impasse." PRC Recording Co., 280 NLRB 615, 639 n.19 (1986), enforced sub nom. Richmond Recording Corp. v. NLRB, 836 F.2d 289, 293 (7th Cir. 1987). Nothing in the Act requires the Board to establish a special rule for "concession" bargaining. As shown below, the Board reasonably declined to do so as a matter of policy.

It is important to note that "concession" bargaining is not limited to failing or financially troubled employers. An employer whose business is profitable, as the Company concedes its business was, (Br 3, 28), may seek reductions in labor costs simply to increase its profits. Moreover, the Company's assertion, (Br 3-4, 5, 6, 8, 12, 18-19, 28, 37), that it needed such reductions to meet nonunion competition is an assertion of unwillingness, not inability, to continue paying the existing wages and benefits. Steelworkers v. NLRB, 983 F.2d 240, 244-245 (D.C. Cir. 1993); Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1338-1339 & n.1 (4th Cir. 1986).

The basic policy of the Act is that changes in wages and benefits, should, whenever possible, result from mutual

agreement, rather than from unilateral action by either party. As this Court has observed, the policy of the Act "is to encourage negotiation and to give the bargaining process a chance to work, even if the chance for success is remote." AMF Bowling Co. v. NLRB, 63 F.3d 1293, 1301 (4th Cir. 1995). Unilateral changes in wages or benefits in the absence of impasse "must of necessity obstruct bargaining, contrary to the congressional policy." NLRB v. Katz, 369 U.S. 736, 747 (1962). Accord Daily News of Los Angeles v. NLRB, 73 F.3d 406, 414 (D.C. Cir. 1996), cert. denied, 519 U.S. 1090 (1997).

The rule permitting unilateral changes after impasse thus represents an exception to the general rule that such changes are disfavored. See NLRB v. Powell Electrical Mfg. Co., 906 F.2d 1007, 1013 n.4 (5th Cir. 1990) (referring to the "impasse exception to the general rule"). Accordingly, the Board is justified in interpreting this exception narrowly.

Moreover, the parties may use impasse itself "as a device to further, rather than destroy, the bargaining process." Charles D. Bonanno Linen Service, Inc., 243 NLRB 1093, 1094 (1979), enforced, 454 U.S. 404, 412 (1982). The Board can reasonably be concerned that lowering the requirements for impasse, and thus for unilateral action, would invite the use of impasse to destroy the bargaining process.

The Company's main argument is that in "concession" bargaining, a union has "every incentive to avoid impasse by stringing out negotiations as long as possible" (Br 21). However, as the dissenting Board member, on whose opinion the Company relies heavily, (Br 17-19, 29, 32, 35, 36 n.10, 38 n.11, 44, 46-47, 50-51), recognized, in "concession" bargaining, "the employer . . . has an incentive to reach impasse or agreement as soon as possible" (A 519), and the Board must be careful "not to allow the parties to create or defeat impasse simply by self-declaration" (A 520; emphasis added). The "impasse" doctrine is designed to avoid "fruitless marathon discussions at the expense of frank statement and support of [a party's] position." NLRB v. American National Ins. Co., 343 U.S. 395, 404 (1952). It is not designed to guarantee that an employer who wants economic concessions will always get them, either through agreement or through unilateral action following impasse. "[T]he right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." American Ship Building Co. v. NLRB, 380 U.S. 300, 309 (1965). The Supreme Court's statement in H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970), that the Act "does not contemplate that unions will always be . . . able to achieve agreement even when their economic position is weak," is equally applicable to employers.

The Board majority stated that, where one party is inflexible while the other has made some concessions and suggested a willingness to make more, it would not "find impasse merely because the [latter] is unwilling to capitulate immediately and settle on the [former's] unchanged terms." (A 516.) To do so, the majority pointed out, "would encourage rigid, inflexible posturing in place of the give-and-take of true bargaining." (Id.) This is especially true in "concession" bargaining, where the position urged by the Company would give the employer seeking concessions a strong incentive to declare at the earliest possible time that its offer is "final," to refuse to consider offers of concessions falling short of its demands, and to give the union a Hobson's choice of either accepting the "final" offer or seeing it implemented anyway following a declaration of impasse. The majority cannot be faulted for concluding that, as between a party whose position is fixed and one whose position is flexible, the rules concerning impasse should favor the latter, rather than allowing the former to "create . . . impasse simply by self-declaration." (A 520 (dissenting opinion)).

The facts of this case illustrate the point. The Board majority found, (A 515), that the Company tried to push the Unions into impasse, by trying to goad Preuett into using language that would indicate inflexibility on the Unions' part.

The Board also found, (A 528), that the Company set an arbitrary deadline, for which it has never offered a compelling justification, for either reaching agreement or declaring impasse. When that deadline arrived, the Unions had made a proposal which, with widely differing wage rates in different states and different rates for residential, commercial, and industrial work, already took into account the need to meet nonunion competition. They asked the Company to tell them in what states further concessions were needed to meet such competition. According to the Company, it was entitled to declare impasse at this point merely because the Unions did not uncritically accept its assertion that it needed the same percentage wage reduction in every state. The Board was not required to reach such a conclusion.

The Company further contends, (Br 48-49), that the Unions' calling a strike demonstrated the existence of an impasse. However, "the calling . . . of a strike does not in itself mean negotiations have reached an impasse . . ." NLRB v. Powell Electrical Mfg. Co., 906 F.2d 1007, 1013 (5th Cir. 1990). The Unions did not call a strike until after the Company had refused to negotiate further; both Preuett's credited testimony (A 161) and the strike notice itself (A 1292) make it clear that the strike was in direct response to that refusal. A strike called under such circumstances is not an admission of impasse; it is,

as the Board found, (A 529), at least as consistent with a belief that the refusal to continue negotiations is legally and factually unjustified.

III. THE BOARD REASONABLY DECLINED TO FIND THAT THE COMPANY HAD ENGAGED IN OVERALL BAD-FAITH BARGAINING

The Board found, (A 527), that the evidence failed to establish that the Company's bargaining prior to its premature termination of negotiations was in bad faith. The Unions challenge this finding (Br 61-63). The complaint in this case (A 559-565) did not allege bad faith bargaining as a separate unfair labor practice, and the Board therefore could not find it to be one. Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1040 (8th Cir. 1976). However, a finding that the Company had not bargained in good faith would be sufficient, without more, to preclude a finding of impasse. NLRB v. Big Three Industries, Inc., 497 F.2d 43, 48 (5th Cir. 1974).

The Board's finding of good faith bargaining "must be upheld unless the determination has no rational basis in the record." Albritton Communications Co. v. NLRB, 766 F.2d 812, 817 (3d Cir. 1985), cert. denied, 474 U.S. 1081 (1986). As shown below, the record amply supports the Board's finding here.

An employer does not violate the duty to bargain in good faith merely by seeking reductions, even substantial ones, in existing wages and benefits. This is not a case where "the

entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible." NLRB v. Mar-Len Cabinets, Inc., 659 F.2d 995, 999 (9th Cir. 1981). The Company plausibly asserted that it needed the requested concessions to meet nonunion competition.

Nor does this case involve "a predetermined resolve not to budge from an initial position." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (dissenting opinion). To the contrary, the Company increased its proposed "targeting" rate from 65 to 75 percent, and then to 80 percent, of the existing wage rate, and offered alternatives to its original proposals that the Tyco health and welfare and pension plans be applied to employees represented by the Unions. These concessions, together with the explanation of its bargaining positions, are strong evidence of good faith bargaining. See Litton Systems, Inc., 300 NLRB 324, 330 & n.25 (1990). Significantly, as the Unions concede, (Br 45), the parties were able, in just three bargaining sessions, to reach agreement on 26 of 31 proposed contract articles. The Company's efforts, unsuccessful because of the Unions' internal problems, to arrange an early start of negotiations are further evidence of good faith. See Walter A. Zlogar, Inc., 278 NLRB 1089, 1093 (1986).

The Unions rely on three aspects of the Company's conduct away from the bargaining table in support of their assertion of overall bad faith bargaining. First, they point, (Br 6), to a mid-1993 survey in which the Company asked its managers to estimate the cost savings from nonunion operation. (A 796-812.) The ALJ (A 527) credited the testimony of the Company's officials that the survey was designed to determine the wages and benefits paid by the Company's competitors, union and nonunion, to assist in formulating proposals for the forthcoming negotiations. (A 43, 47-48, 274, 276.) He also noted that the Company promptly furnished the Unions the information obtained in the survey (A 527; 46)--an action wholly inconsistent with a secret plan to use the information to oust the Unions. The Company was clearly entitled to try to find out, before seeking concessions in negotiations, what concessions it would need to match the competition, and nothing in the record compels rejection of the Board's finding (A 527) that the survey had only that purpose.

Second, the Unions rely, (Br 11, 62), on an internal Company memo setting forth the benefits to be paid "in the event that [the Company] implements [its] final offer" (A 965.) The memo is dated March 23, 1994, the day after Local 669 notified its members of an intent to strike the Company on April 1. (A 1258.) The author of the memo did not testify. However, she was not even employed by the Company. (A 131.) Further, the memo made

it clear that the enclosed benefits package was to apply only to striker replacements, not to "crossover" (non-striking) employees. (A 965.) Such a memo, sent when the Company had reason to expect a strike soon, is hardly compelling evidence of a premeditated plan to insist on a particular benefits package (which the Company did not do), then declare impasse and, contrary to the language of the memo, unilaterally implement the package, not only for striker replacements, but for all employees.

Finally, the Unions rely, (Br 62-63), on the Company's offering nonstriking employees better terms than it had offered the Unions, by paying them the wage rates in the expired contract. The Board found this conduct to be a separate violation of the Act. (A 535-536 & n.13.) However, it found this violation only as to eight employees, and the violation was committed by their district manager, who did not participate in the contract negotiations. (A 498, 501, 504.) This violation, affecting fewer than 1 percent of the 1100 to 1200 bargaining unit employees (A 54), does not compel a conclusion that the Company's prior bargaining was in bad faith with respect to the entire bargaining unit. Cf. Litton Systems, Inc., 300 NLRB 324, 330 (1990) (three unlawful unilateral actions by employer held not to warrant finding of overall bad faith bargaining; Board

noted its reluctance to make such a finding based solely on misconduct away from bargaining table).

IV. THE BOARD REASONABLY DECLINED TO FIND THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY CONSTRUCTIVELY DISCHARGING ITS STRIKING EMPLOYEES

When the Unions called a strike, the Company sent its employees a letter saying, inter alia, "If some of our employees strike, we will hire permanent replacements to perform our work. Permanent replacements have the right to work even if the strike ends." (A 710 (emphasis added).) The Board found that, since the strike was an unfair labor practice strike, the foregoing language unlawfully threatened the employees with permanent replacement. (A 536.) However, it rejected the General Counsel's contention that the letter effectively terminated the striking employees in violation of Section 8(a)(3) and (1) of the Act (id.) The Unions now contend, (Br 64-67), that the letter was an unlawful "constructive discharge" of the striking employees.

The facts of this case do not fit the usual scenario for a "constructive" discharge, in which an employee quits his or her job because the employer has changed his or her working conditions. In such cases, the Board will find an unlawful constructive discharge if, and only if, two elements are present. First, the employer must make, and intend to make, the employee's working conditions so difficult or unpleasant as to force the

employee to resign. Second, the changes must be motivated by the employee's protected activity. Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976). Accord NLRB v. CWI of Maryland, Inc., 127 F.3d 319, 328-329 (4th Cir. 1997). The first element is wholly absent here. The only changes in the employees' working conditions were those resulting from the implementation of the Company's final offer. Although these changes reduced the employees' wages and benefits, there is no evidence that the reductions were intended to force the employees to quit or were so severe that their quitting was a foreseeable result. Cf. Park Inn Home for Adults, 293 NLRB 1082, 1087 (1989) (employees who struck in response to unlawful unilateral changes in working conditions held not constructively discharged); Algreco Sportswear Co., 271 NLRB 499, 500-501 (1984) (quitting because of discriminatory placement in lowest pay classification held not constructive discharge).

The Board was also warranted in finding that the letter in issue did not actually discharge employees. An actual discharge occurs "if the words or action of the employer 'would logically lead a prudent person to believe his tenure had been terminated.'" NLRB v. Trumbull Asphalt Co. of Delaware, 327 F.2d 841, 843 (8th Cir. 1964) (citations omitted). A threat to

discharge strikers, even if unlawful, is not equivalent to an actual discharge. La Famosa Foods, 282 NLRB 316, 327 (1986).<sup>8</sup>

In this case, the Company's letter expressly stated that "[e]ach of our employees has the right to work and may do so even though a strike has been called" and that "if the strike ends, you will have the right to continue working for [the Company] so long as you pay your dues" (A 710.) No reasonable employee, upon reading those words, could conclude that he or she no longer had the option of remaining in the Company's employ. The subsequent reference to replacement was expressly conditioned on the employees' deciding to strike, and thus constituted a threat to take action in the future that would adversely affect the employees' job status, rather than a notification that such action had already been taken.

This point distinguishes the instant case from those on which the Unions rely (Br 64-65): Noel Corp., 315 NLRB 905, 907-909 (1994), enforcement denied in pertinent part, 82 F.3d 1113, 1117-1120 (D.C. Cir. 1996), and American Linen Supply Co., 297

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<sup>8</sup> The Unions rely, (Br 66), on Conair Corp., 261 NLRB 1189, 1190 (1982), which they assert was "enforced in pertinent part" by the District of Columbia Circuit. In fact, the court, while upholding the Board's finding of an unlawful threat of discharge, reversed its finding of an actual unlawful discharge on the ground that the complaint (which expressly alleged the unlawful threat) did not allege actual discharge. Conair Corp. v. NLRB, 721 F.2d 1355, 1370-1372 (D.C. Cir. 1983). Thus, the court's decision in Conair supports the proposition that a threat of discharge is not the same as an actual discharge.

NLRB 137, 137 & n.3 (1989), enforced, 945 F.2d 1428, 1432-1433 (8th Cir. 1991). In both cases, the employers falsely informed the employees, just before the strikes began, that permanent replacements had already been hired. Such a statement conveys the message to employees that the act of striking, without more, will eliminate the option of working for the employer in the future. Where the strike is imminent (ten minutes away in American Linen, two hours in Noel), such a statement "effectively result[s] in withholding from strikers the right to return to their unoccupied jobs . . ." Noel, 315 NLRB at 907. But where employees have time to consider the consequences of striking, a statement that they will be permanently replaced at some point after they go on strike does not have the effect of immediately ending their employment. Thus, in Noel, the Board held that statements that permanent replacements had been hired did not effectively discharge employees who were not scheduled to work until the following afternoon or who worked on the morning after the unlawful statements but later went on strike. Noel, 315 NLRB at 908 n. 16, 909 n.17.<sup>9</sup>

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<sup>9</sup> Noel also held that when employees were given a choice between quitting or abandoning their bargaining representative, those who did not quit were not constructively discharged. 315 NLRB at 909-910. This holding requires rejection of the Unions' assertion of a "constructive" discharge here, as there is no evidence that any employee quit in response to the April 13 letter.

Here, the Company had already told the employees in two previous letters that it would hire permanent replacements in the event of a strike. (A 707-709.) The April 13 letter told the employees nothing new in this respect; it did not say that replacements either had been hired or would be hired by a specific deadline. Thus, the employees already had ample time to consider the consequences of a strike, and were not suddenly confronted, as the employees in Noel and American Linen were, with the need to make an immediate and irreversible decision. Their position was more analogous to that of the employees held in Noel not to have been effectively discharged.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for review should be denied and that the Board's order should be enforced in full.

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January 2000

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